PP

v.

LOW HUA UNG & ANOR

HIGH COURT SABAH & SARAWAK, SIBU
HAMID SULTAN ABU BACKER JC
[CRIMINAL APPEAL NO: 41-9-2007]
16 APRIL 2008

CRIMINAL PROCEDURE: *Forfeiture - Vessels - Refusal to forfeit three vessels pursuant to s. 209D(3) Sarawak Land Code - Appeal against - Whether charge referred to vessels or cranes having been used to commit offence - Whether court could exercise its power of forfeiture*

CRIMINAL PROCEDURE: *Sentence - Adequacy - Appeal against - Whether sentence given inadequate*

The prosecution herein appealed against the decision of the learned magistrate who refused to forfeit three vessels pursuant to s. 209D(3) Sarawak Land Code (SLC) and also regarding the inadequacy of the sentence. The facts were that the respondents had been charged under s. 32A(1) of SLC. Both the respondents had pleaded guilty, were convicted and the learned magistrate had imposed a fine of RM5,000. In addition, the learned magistrate in reliance of the brief statement of facts of the case tendered by the prosecution after the guilty plea was recorded, went on to forfeit the four cranes which was purported to have been used in the crime but ordered three vessels which were also purported to have been used in the crime to be released. It was the appellant's assertion that (i) the learned magistrate had the evidence before her to satisfy herself that the three vessels had been used in the commission of the offence; (ii) the brief facts tendered were admissible evidence and not hearsay evidence as alleged by the honourable court; (iii) there were no written laws or case laws to say that the brief facts tendered by the prosecution when the accused pleaded guilty were hearsay evidence. The respondents *inter alia* argued that there was no evidence by the prosecution or at all to show to the satisfaction of the trial magistrate that the vessels seized was the subject matter or used in the commission of the offence and that there was no evidence to show that the said vehicle was liable to be forfeited under s. 209D(3) SLC. In respect of the appellant's appeal against inadequacy of sentence,

A the respondents said that there was no merit as the learned magistrate had sentenced both the accused to a maximum fine each which was the only penalty available under s. 32A(3) of SLC.

B **Held (dismissing the appeal):**

(1) The charge herein did not refer to vessels or cranes having been used to commit the offence. In such circumstances and facts, the court could not in law exercise its power of forfeiture when s. 209D(3) of SLC particularly said the thing C was 'the subject matter of or was used in the commission of the offence.' It was not *sine qua non* for forfeiture that any person must be convicted. However, it was a condition precedent to prove that an offence under ss. 32A or 209 of SLC had been committed and the thing *ie*, the vessels in this D case were the subject matter of or were used in the commission of the offence, according to law. (para 10)

(2) It was not correct in law to barely rely on the brief facts of the case by the prosecution. Brief facts tendered by the E prosecution after the accused had pleaded guilty was not part of the evidence. The law of evidence in substance is related to conviction and the brief facts could not be used in law for the purpose of conviction or any other related matters as to liability save as to use for the purpose of sentencing only. F Similarly is the mitigation statement by the defence, which in practice is only related to the sentencing of the accused. This distinction must always be kept in mind as brief statement of facts would not pass the test relating to exception of hearsay rule, to be made admissible for the purpose of conviction or G forfeiture. Further, if such statements were used for conviction or to forfeit property, it would be in breach of constitutional safeguards, in particular various articles of the Federal Constitution. (para 10)

H **(3)** The prosecution reliance in the supreme court case of *Gan Bee Huat* was not applicable on the facts of this case as there was no equipollent provision as s. 209D(3) in particular the phrase 'the thing was the subject matter of or was used in the commission of the offence' in the Dangerous Drugs (Forfeiture I of Property) Act 1988. (para 10)

Case(s) referred to:

Keng Soon Finance Bhd v. Pegawai Kanan Kastam, Johore Bahru [1981] 1 LNS 63 FC ***(refd)***

Ketua Polis Negara & Anor v. Gan Bee Huat & Other Appeals [1998] 3 CLJ 1 SC ***(dist)***

Leken Gerik (M) v. PP [2007] 8 CLJ 158 HC ***(refd)***

Nadeson v. PP [1965] 1 LNS 123 ***(refd)***

Ngeranter Ripai v. PP [1990] 2 CLJ 273; [1990] 2 CLJ (Rep) 530 HC ***(refd)***

Mohammad Hassan v. PP [1997] 1 CLJ Supp 485 HC ***(refd)***

PP v. Hon Jin Bong & Anor [1998] 1 LNS 360 ***(refd)***

PP lwn. Lee Kee Seng & Satu Lagi [2005] 3 CLJ 649 HC ***(refd)***

PP v. Margarita B Cruz [1987] 1 LNS 129 ***(refd)***

PP v. Mui Finance Bhd Batu Pahat [1996] 1 LNS 155 ***(refd)***

PP v. Mohd Aszzid Abdullah [2008] 1 MLJ 281 ***(refd)***

PP v. Soon Tiew Choon [1975] 1 LNS 136 ***(refd)***

PP v. Tan Lee Kok [1998] 2 CLJ 286 CA ***(refd)***

Supramaniam v. Kanthasamy [1955] 1 LNS 153 ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 307(6)

Customs Act 1967, ss. 126, 128(4)

Dangerous Drugs (Forfeiture of Property) Act 1988, s. 32(3)

Land Code (Cap 81) (Sarawak), ss. 32A(1), 32A(3), 209(1), 209B(1)(b), 209B(2), 209D(3), 209D(4)(a), 209D(4)(b)

Trade Description Act 1972, ss. 3(1)(a), 32

For the appellant - Musli Abd Hamid DPP

For the respondents - Paul Liong; M/s Liong & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the prosecution's appeals against the decision of the learned magistrate who refused to forfeit three vessels pursuant to s. 209D(3) Sarawak Land Code (SLC) and also inadequacy of sentence.

Brief Facts

[2] The respondents were charged under s. 32A(1) of SLC as follows:

A That you, jointly on the 21st day of June, 2004 at about 1240 hours at Ulu Lanang, Batang Rajang, Sibu did remove rock material, to wit, sand from State land without a licence issued to you by the Superintendent of Lands and Surveys, and thereby you all have committed an offence under Section 32A(1) of the
B Land Code (Cap. 81) and punishable under Section 32A(3) of the said Code.

[3] On 13 February 2007 both the respondents pleaded guilty, were convicted and the learned magistrate imposed a fine of RM5,000. In addition, the learned magistrate in reliance of the
C brief statement of facts of the case tendered by the prosecution after the guilty plea was recorded, went on to forfeit four cranes which was purported to have been used in the crime but ordered three vessels which were also purported to have been used in the crime to be released.

D

Preliminaries

[4] There are two petitions of appeal filed by the appellant. In one, the prosecution specifically complained of inadequacy of sentence and the other, *inter alia* as follows:
E

> Your humble petitioner is dissatisfied with the order and appeal on the following ground:
>
> (a) The learned Magistrate had erred in law when she ordered the three vessels to be released to the respondents despite
F the law provided under section 209D(3) of the Sarawak Land Code (Cap. 81) clearly states otherwise.
>
> For the reason given above, the order imposed is wrong and unsuitable to the facts and circumstances of the case.
>
G Your humble petitioner therefore prays that the order to be set aside and the three vessels to be forfeited.

[5] I note that the complaint of the vessels not being forfeited in consequence of it being used for the purpose of the crime was
H no where reflected in the charge ie, the charge did not show any nexus to the complaint raised in the charge. Section 209D of SLC (Cap. 81) reads as follows:

> (1) All things seized in exercise of the powers conferred by section 209B(1) **shall be liable to forfeiture**
I
> (2) ...

(3) An order for the forfeiture or for the release of anything seized in exercise of the powers conferred under section 209B(1) shall be made by the court before which the prosecution with regard thereto has been held and an order for the forfeiture of the thing shall be made if it is proved to the satisfaction of the court that an offence under section 32A or 209 has been committed and that **the thing was the subject matter of or was used in the commission of the offence** notwithstanding that no person may have been convicted of such offence.

The appellant says, as stated in the brief facts (i): "During the operation, along the Batang Rejang and Igan on the abovesaid date, the enforcement officers found, and several vessels extracting or removing sand from rivers. The vessels together with the sand on board were detained and then seized as exhibits."; (ii) the enforcement team led by Lim Bih Wei detained and seized a ship "Ek Soon Ching No. 99" with its two cranes together with about 1000 tons of sand; a tugboat "Riki" and a tongkang "Vektor with two cranes together with sand on board at Rantau Panjang, Batang Igan, Sibu; (iii) the enforcement officers saw that the cranes on the vessels were in the process of extracting or removing sands from the said river and loading them on the said vessels; (iv) investigation revealed that Ek Soon Ching Gravel Merchant, Sibu was the owner of the said vessels. It was discovered that Ek Soon Ching Gravel Merchant had a temporary permit issued by Islecity Sdn. Bhd. Kuching to remove or extract sand and gravel from that part of Batang Igan, Sibu under Licence No. 3D/SG/1/2003 dated 11 March 2004 but the said permit had expired on 14 May 2004; (v) by virtue of the brief facts tendered by the prosecution during the trial, it was crystal clear that the things seized during the operation by the authority were three vessels and their cranes and all the vessels and their cranes were used in the commission of the offence in the present case; (vi) by referring to the brief facts and the photographs (exh. P9) tendered by the prosecution, the appellant could not understand why the learned magistrate only ordered the forfeiture of the cranes without their vessels even though there was clear evidence from the photographs tendered, it is unreasonable for the respondent in the present case to extract sand from the rivers concerned in the absence of the vessels; (vii) all the cranes seized during the operation were attached to the vessels respectively. The brief facts of the case also mentioned that, the enforcement officers saw the cranes on the vessels were in the process of extracting or

removing sands from the said river and loading them on the said vessels; (viii) by virtue of s. 32A and s. 209D of the Sarawak Land Code (Cap. 81), the appellant prays for these three vessels to be forfeited to the government.

Appellant's Submission

[6] The appellant says: (i) four cranes on board the vessels were forfeited to the government and a ship "Ek Soon Ching No. 99", a tugboat "Riki", and a tongkang "Vektor" (hereinafter referred to as three vessels) were released to the respondents. The appellant was dissatisfied with the release of the three submitted vessels to the respondents, that the said vessels seized from the respondents must be forfeited to the Government as these three vessels were used in the commission of the offence in the present case; (ii) The learned magistrate had erred in law and in facts when she released the three vessels in the present case as the law said that; anything used and seized in the commission of the offence must be forfeited to the government; (iii) The clear words in s. 209D(3), which says "shall be liable to forfeiture" does not give any discretionary power to the learned magistrate to release the three vessels used in the commission of the offence in this present case. It is the submission of the appellant, the order of forfeiture under s. 209D of the code is mandatory, if it is proven to the satisfaction of the court that an offence had been committed and the things seized were used in the commission of the offence; (iv) Justice Sulong in the case of *Public Prosecutor v. Hon Jin Bong & Anor* [1998] 1 LNS 360 held that; "There is a paucity of authority on forfeiture of goods under the Trade Description Act 1972. The Federal Court in *Keng Soon Finance Bhd. v. Pegawai Kanan Kastam, Johore Bahru* [1981] 1 LNS 63 did consider forfeiture under Customs Act 1967, by way of an *obiter*. Abdul Hamid FJ (as he was then) said, "If the court is satisfied after considering the whole of the materials before it, that an offence against the Act has been committed and that the goods were the subject matter or the vehicle was used in the commission of such an offence, then, in that event, and not otherwise, it is mandatory for the court to make an order of the forfeiture. It is clear therefore that before an order of forfeiture is made, the court must be satisfied that the goods were the subject matter or were used in the commission of the offence and not otherwise." That s. 32 of the Trade Description Act states as follows: "(1) All goods seized in exercise

of any power conferred under this Act shall be liable to forfeiture. (2) An order for the forfeiture or for the release of any goods seized in exercise of any power conferred under this Act shall be made by the court before which the prosecution with regard there to has been held and an order for the forfeiture of the goods shall be made if it is proved to the satisfaction of the court that an offence under this Act has been committed and that the goods were the subject matter of or were used in the commission of the offence notwithstanding that no person may have been convicted of such offence"; (v) Justice Mohd Ghazali in the case of *Public Prosecutor v. Mui Finance Bhd Batu Pahat* [1996] 1 LNS 155 was also of the same view that; the wording shall be liable to forfeiture in s. 126 of the Customs Act 1967 connotes mandatory in nature if it has been proven to the satisfaction of the court, the subject matter of the claim was used in the commission of such offence. Justice Mohd Ghazali held in his judgment; "A proceeding under s. 128(4) is to determine whether an offence against the Act has been committed, and, if it has, whether the conveyance, a subject matter of the claim is used in the commission of such an offence. If the magistrate is satisfied that the conveyance was used in the commission of the offence, he shall order its forfeiture. Section 128(4) is definitely penal in nature and was treated so in *Keng Soon Finance Bhd. v. Pegawai Kanan Kastam, Johore Bahru*". That s. 126 and s. 128 of the Customs Act 1967 states as follows:

Section 126. Goods liable to seizure liable to forfeiture.

All goods liable to seizure under this Act, shall be liable to forfeiture.

Section 128. Goods seized in respect of which there is no prosecution, or the proceeds of sale thereof, are forfeited if not claimed within one month.

(1) If there be no prosecution with regard to any goods seized under this Act, such goods or the proceeds of sale of such goods which are held pursuant to paragraph 115(1)(c) shall be taken and deemed to be forfeited at the expiration of one calendar month from the date of seizure of the goods unless, before such expiration:

(a) a claim to such goods or the proceeds of sale of such goods is made under subsection (2);

A (b) a written application is made for the return of such goods under paragraph 115(1)(a) or (b); or

(c) such goods are returned under the said paragraph (a) or (b).

(2) Any person asserting that he is the owner of such goods or
B the proceeds of sale of such goods, as the case may be, and that they are not liable to forfeiture may give written notice of a senior officer of customs that he claims the same.

(3) On the expiration of the period mentioned in subsection (1), or, if a decision is made earlier that there be no prosecution with
C regard to the goods, on the making of the decision the senior officer of customs shall, if such goods or the proceeds of sale of such goods are not taken and deemed to be forfeited under that subsection, refer the claim to the Director General who may direct that such goods or the proceeds of sale of such goods or
D the security furnished under paragraph 115(1)(a) or (b), as the case may be, be released, or may direct such senior officer or customs, by information in the prescribed form, to refer the matter to a Magistrate of the First Class for his decision.

(4) The magistrate of the first class shall issue a summons
E requiring the person asserting that he is the owner of the goods or the proceeds of sale of such goods, and the person from whom the goods were seized, to appear before him, and upon their appearance or default to appear, due service of such summons being proved, the magistrate of the magistrate of the
F first class shall proceed to the examination of the matter, and upon proof that an offence against this Act or any regulations made thereunder has been committed and that such goods were the subject matter, or were used in the commission, of such offence, shall order such goods or the proceeds of sale or such goods or the amount secured under paragraph 115(1)(a) or (b), as the case
G may be, to be forfeited, or in the absence of such proof, may order the release of such goods or the proceeds of sale of such goods or the security furnished under paragraph 115(1)(a) or (b), as the case may be.

(5) In any proceedings under subsection (4), section 119 shall
H apply to the person asserting that he is the owner of the goods and to the person from whom they were seized as if such owner or person had been the defendant in a prosecution under this Act.

(vi) By virtue of the above mentioned authorities, the word "shall
I be liable to forfeiture" in s. 209D of the Sarawak Land Code connotes a mandatory forfeiture of the things seized, if it has been proven to the satisfaction of the court that the things seized were used in the commission of the offence; (vii) There was no necessity

in law for the learned magistrate to conduct a special proceeding whether it is necessary for the learned magistrate to conduct a special proceeding for the forfeiture of the three vessels in the present case where there was a prosecution made against the respondents relating to the property in this case. It is clear from the wording in s. 209D of the code, especially in sub section (3) and sub section (4), that if there was a prosecution made against the accused as regard to the property seized, the property shall be forfeited if the court is satisfied that the said property had been used in the commission of the offence. Sub section (4) of s. 209D had made it clear that if there was no prosecution made against the accused as regard to the property and there was a claim by the owner of the said property, the claim and the property itself must be referred to the magistrate for examination of the claim of the said property. Applying the same principle in our present case, the prosecution against the respondents as regard to the three vessels had been instituted. Therefore, subsections (3) of s. 209D is applicable and not subsection (4) of s. 209D of the code. Subsection (4) will only apply if there was no prosecution instituted against the respondents as regard to the said property provided that, there was a claim by the owner of the same property; (viii) section 209D(4) of SLC has the same effect as s. 32(3) of the Dangerous Drugs (Forfeiture of Property) Act 1988. That s. 32 reads as follows:

> (1) Where any property has been seized under this Act, other than under or by virtue of Part VII, and
>
> (a) no prosecution for any offence under any law is instituted with regard to such property;
>
> (b) no proceedings are commenced by the Public Prosecutor for the forfeiture of such property under Part III; and
>
> (c) no claim in writing is made by any person that he is lawfully entitled to such property and that it is not liable to forfeiture under this Act or under the Dangerous Drugs Act 1952, within three months from the date of its seizure, the property shall become forfeited immediately upon the expiration of the said period of three months.
>
> (2) Where within three months from the date of the seizure of any property under this Act, a claim in writing is made thereto by any person in the terms mentioned in paragraph (c) of sub section (1), the Public Prosecution shall within fourteen days after the expiry of the said period of three months, refer such claim to a sessions court for its decision.

A (3) The session court to which a claim is referred under sub section (2) shall issue a summons requiring the person claiming that he is lawfully entitled to the property, and the person from whom it was seized, if he and his whereabouts are known, to appear before the court and upon such
B appearance or in default of such appearance, upon due service of such summons being proved, the sessions court shall proceed to the examination of the matter and if satisfied that no offence under this Act or under the Dangerous Drugs Act 1952 has been committed in respect of the property claimed and that such property is not illegal
C property, shall order the same to be released to the person claiming the same upon proof that he is lawfully entitled thereto, and shall, in any other case, order the property to be forfeited.

D In *Ketua Polis Negara & Anor v. Gan Bee Huat & Other Appeals* [1998] 3 CLJ 1, the Supreme Court headed by PCA Lamin Mohd Yunus (as His Lordship then was) held that:

As we understand the law, the Public Prosecutor may or may not take the option to make the application under s. 8(1). It is entirely
E at his discretion. In the cases before us he opted not to make the application. In our view this has satisfied para. (b) of sub section (1) of s. 32. *At this point we should mention that as a fact no prosecution under any law has been instituted with regard to the property seized. Therefore the condition as required under para. (a) of sub section (1) of s. 32 has been fulfilled.* As a result he availed
F himself of the benefit of s. 32(1)(c). To appreciate fully the operation of s. 32(1)(c), perhaps we need to reproduce only sub sections (1), (2) and (3) of the said section which read:

32. Forfeiture of property seized under this Act where there is
G no prosecution, or no proceedings under Part III or no claim thereto.

(1) Where any property has been seized under this Act, other than under or by virtue of Part VII, and:

H (a) no prosecution for any offence under any law is instituted with regard to such property;

(b) no proceedings are commenced by the Public Prosecutor for the forfeiture of such property under Part III; and

I (c) no claim in writing is made by any person that he is lawfully entitled to such property and that it is not liable to forfeiture under this Act or under the Dangerous

Drugs Act 1952, within three months from the date of its seizure, the property shall become forfeited immediately upon the expiration of the said period of three moths.

(2) Where within three months from the date of the seizure of any property under this Act, a claim in writing is made thereto by any person in the terms mentioned in paragraph (c) of subsection (1), the Public Prosecutor shall within fourteen days after the expiry of the said period of three months, refer such claim to a sessions court for its decision.

(3) The sessions court to which a claim is referred under subsection (2) shall issue a summons requiring the person claiming that he is lawfully entitled to the property, and the person from whom it was seized, if he and his whereabouts are known, to appear before the court and upon such appearance or in default of such appearance, upon due service of such summons being proved, the sessions court shall proceed to the examination of the matter and if satisfied that no offence under this Act or under the Dangerous Drugs Act 1952 has been committed in respect of the property claimed and that such property is not illegal property, shall order the same to be released to the person claiming the same upon proof that he is lawfully entitled thereto, and shall, in any other case, order the property to be forfeited.

In the cases before us, if it is shown that no action as described in para. (a), (b) or (c) of subsection (1) of s. 32 has been taken with regard to the property already seized within three months from the date seizure, the property shall become forfeited immediately upon the expiration of the said period. We have however mentioned earlier that no action as described in either para. (a) or (b) or subsection (1) has been taken. But para. (c) requires that if a claim in writing is made to the Public Prosecutor or the police at any time within the said period of three months to the effect that he is lawfully entitled to the property and that the property is not liable to forfeiture, it is incumbent on the part of the Public Prosecutor to refer the claim to the sessions court within 14 days after expiration of the said period of three months for its decision (subsection (2)). Upon receipt of the Public Prosecutor's reference, the sessions court shall then issue a summons requiring the person claiming to appear and upon appearance the court shall proceed with the inquiry with the view to ascertain, to its satisfaction, whether an offence under the Act or under the Dangerous Drugs Act 1952 has been committed in respect of the property. If no such offence has been committed and that the property is not an illegal property within the meaning of the Act, the court shall release the property to the person

making the claim upon proof that he is entitled thereto. In any other case, the court shall order the property to be forfeited (subsection (3)). Until the day of the hearing of the four appeals by us (a period of eight to nine years from the date or dates of seizure), none of the respondents has made any claim.

(viii) *Gan Bee Huat*'s case had also been adopted in the case of *Public Prosecutor v. Tan Lee Kok* [1998] 2 CLJ 286 (Court of Appeal) and in the case of *PP lwn. Lee Kee Seng & Satu Lagi* [2005] 3 CLJ 649; (x) Section 209D is not applicable for the learned magistrate to hold another separate proceeding for the forfeiture of the three vessels in the present case, as there was a prosecution instituted against the respondents as regard to these three vessels. Section 209D(4) of the Code is only applicable if there was no prosecution instituted by the Public Prosecutor as regard to the vessels seized and there was a claim made by the owner to these three vessels. The appellant stressed that, by virtue of s. 209D(3) of the Code, it was the duty of the learned magistrate to forfeit the three vessels when the respondents pleaded guilty to the charge; (ix) Brief facts of the case is sufficient evidence for the learned magistrate to satisfy herself that the three vessels had been used in the commission of the offence under s. 32A of the Code. The brief facts tendered by the prosecution were admissible evidence in criminal law in our country and not a hearsay evidence as mentioned by the court on 26 February 2008. Although CPC did not mention about the requirement of brief facts when the accused pleaded guilty to the charge, the case law made it mandatory for the prosecution to tender the brief facts of the case before the accused's plea of guilty can be accepted by the court. Otherwise, the conviction must be quashed. In the case of *Supramaniam v. Kanthasamy* [1955] 1 LNS 153, Spenser Wilkinson J held that: "the learned magistrate recorded the plea and convicted him thereon. No statement of the facts, however, was called for or recorded and the appellant alleges that had the facts been outlined it would have been apparent that he did not intend to plead guilty to the charge. The court have very frequently laid down that upon a plea of guilty the magistrate must either take evidence or a statement of the facts and record them. As this had not been done in this case, I quashed the conviction and remitted the case to the magistrate for retrial."; (iix) Although there are no written laws said on the requirement of the brief facts, there are many case laws which confirmed the requirement of brief facts to be tendered by the prosecution before the guilty

plea of the accused can be accepted. The same principle had been laid down in the case of *Mohammad Hassan v. Public Prosecutor* [1997] 1 CLJ Supp 485; *Public Prosecutor v. Margarita B Cruz* [1987] 1 LNS 129, *Nadeson v. PP* [1965] 1 LNS 123 and *PP v. Soon Tiew Choon* [1975] 1 LNS 136.

[7] In consequence, the appellant asserts that (i) the learned magistrate had the evidence before her to satisfy herself that the three vessels had been used in the commission of the offence; (ii) the brief facts tendered were admissible evidence and not hearsay evidence as alleged by the honourable court; (iii) there are no written laws or case laws to say that the brief facts tendered by the prosecution when the accused pleaded guilty were hearsay evidence.

Respondents' Submission

[8] In respect of the appellant's appeal against inadequacy of sentence, the respondents say (i) there is no merit as the learned magistrate had sentenced both the accused to a maximum fine of RM5,000 each which is the only penalty available under s. 32A(3) of Sarawak Land Code having duly considered the mitigation of both the accused; (ii) inadequacy of sentence *per se* is not a valid ground for appeal; (iii) there is a failure to strictly comply with s. 307(6) of CPC for stating and containing a definite particular point of law or facts as contained in the 1st petition of appeal, with regard to the trial magistrate is alleged to have erred. On this issue, the respondents rely on the following cases decided by me, namely: (i) *Leken Gerik (M) v. PP* [2007] 8 CLJ 158, [2007] 3 AMR 230, [2007] 3 MLJ 730; (ii) *PP v. Hisla bin Sulai* (Kuching High Court Cri-App-41-14-2007-II); (iii) *PP v. Mohd. Aszzid Abdullah* [2008] 1 MLJ 281.

[9] On the issue of forfeiture, the respondents say (i) there is no evidence to show that the said vehicle is liable to be forfeited under s. 209D(3) SLC; (ii) there is no evidence by the prosecution or at all to show to the satisfaction of the trial magistrate that the vessels seized is the subject matter or used in the commission of the offence; (iii) from the brief facts it is clear that before the said vessels were detained and seized by the seizing officer, the following had been complied with as statutory requirement under s. 209(1), s. 209B(2) of SLC as follows: (a) that the seizing officer is either not below the rank of Superintendent or otherwise duly authorized by the director of the

Lands & Surveys Department as required under s. 209B(1) SLC; (b) that the seizing officer had reasons to believe that the said cranes and vessels are the alleged things used in the commission of the offence, before exercising the power of seizure of (based on justifiable reasons, facts or conclusion in contrast with 'reason to suspect' based on speculation and conjecture as required under s. 209B(1)(b) SLC; (c) that the seizing officer had declared his office or authority to the person whom he is acting as required under s. 209B(2) SLC; (v) furthermore, after receiving a claim (under s. 209D(4)(a) SLC) by the rightful owners of the things seized ie, crane and vessels, the Superintendent had again failed to refer the claim to the first class magistrate court for enquiries and decision as required under s. 209D(4)(b) and (c) SLC; (vi) section 209D of SLC is a forfeiture provision in respect of all things seized under section 209B which shall be liable to forfeiture, hence it must be strictly construed and applied. In *Ngeranter Ripai v. PP* [1990] 2 CLJ 273; [1990] 2 CLJ (Rep) 530, the court stated that forfeiture imposes a severe and harsh penalty on subjects, sometimes even on innocent subjects. Therefore, forfeiture provision ought to be strictly construed and applied; (vii) before an order of forfeiture of anything seized shall be made by the court under s. 209D(3) SLC, the seizure of the 'anything' by the seizing officer must be legal, proper and in strict compliance with s. 209B and s. 209D(4) SLC as failure to comply strictly to the said section would render an order of forfeiture bad in law and liable to be set aside. In *Ngeranter Ripai (supra)* Chong Siew Fai J (as he then was) observed:

> Forfeiture imposes a severe and harsh penalty on subjects, sometimes even on innocent subjects. Therefore, forfeiture provisions must be strictly construed and applied.

In the instant case under appeal, the statement of facts given by the prosecution and admitted by the appellant, so far as is relevant to the issue in point, reads:

> … the vehicle was detained s. 52(1) Commercial Vehicles Licensing Board Act 1987 (Act 334) but was released to the accused as allowed under section 52(2) Commercial Vehicles Licensing Board Act 1987 (Act 334) few days later.

Section 52 of the Act does not provide power of seizure. Moreover, the facts given by the prosecution do not disclose that the motor vehicle in question had been seized by officer or officers authorized under section 51(1) of the Act. Since neither the statement of facts nor any evidence establishes that the motor vehicle had been properly seized, the order of forfeiture is bad must be set aside.

In the light of the view I take of the above ground (7), it is unnecessary to deal with the other grounds of appeal.

For the above reasons, the conviction is affirmed but the order for forfeiture of the motor vehicle is set aside.

In *PP v. Hon Jin Bong & Anor* [1998] 1 LNS 360, the High Court affirmed the sessions court's order releasing the six machines allegedly been used in the commission of an offence under s. 3(1)(a) of the Trade Description Act 1972 ('TDA') as the agreed facts tendered by the prosecution had not disclosed that the said six machines were used in the commission of the offence and no unfavourable inference and/or circumstantial evidence could be used in drawing such an inference to support an order of forfeiture under s. 32 TDA; (viii) the learned magistrate did make a finding of facts as follows: (i) the charge and brief facts tendered by the prosecution shows that the offending words are "extracting or removing sand from the river" and that the said act is seen to be done by the cranes; (ii) Therefore this court is of the opinion that taking into consideration all the above mentioned, the sentence (ie, sentence of a fine of RM5,000) and order (ie, the forfeiture of the four cranes to the appellant and the release of the three vessels to the respondents) are appropriate and reasonable in this case.

[10] I have read the appeal record, petition of appeal and the submission of the parties in detail. I take the view the appeal must be dismissed. My reasons are as follows:

(i) in this case, the charge does not refer to vessels or cranes having been used to commit the offence. In such circumstances and facts, the court could not in law exercise its power of forfeiture when s. 209D(3) of SLC particularly says the thing was "the subject matter of or was used in the commission of offence." Having said that, I agree that it is not *sine qua non* for forfeiture that any person must be convicted. However it is a condition precedent to prove that an offence under

A ss. 32A or 209 of SLC has been committed and the thing ie, the vessels in this case were the subject matter of or were used in the commission of the offence, according to law. For this purpose it is not correct in law to barely rely on the brief facts of the case by the prosecution. Brief facts tendered by
B the prosecution after the accused has pleaded guilty is not part of the evidence. The law of evidence in substance is related to conviction and the brief facts cannot be used in law for the purpose of conviction or any other related matters as to liability save as to use for the purpose of sentencing only.
C Similarly is the mitigation statement by the defence, which in practice is only related to the sentencing of the accused. This distinction must always be kept in mind as brief statement of facts will not pass the test relating to exception to hearsay rule, to be made admissible for the purpose of conviction or
D forfeiture. Further, if such statements are used for conviction or to forfeit property, it will be in breach of constitutional safeguards, in particular various articles of the Federal Constitution.

E (ii) The prosecution reliance in the supreme court case of *Gan Bee Huat (supra)* is not applicable on the facts of this case as there was no equipollent provision as s. 209D(3) in particular the phrase "the thing was the subject matter of or was used in the commission of the offence" in the Dangerous Drugs
F (Forfeiture of Property) Act 1988.

For reasons stated above, the appeal is dismissed. I hereby order so.

G

H

I